No. 286

IN THE

Supreme Court of the United States

October Term, 1958

EDGAR V. MAHER,

Petitioner,

v.

HARRIS ELLSWORTH, ET AL.,

Respondents.

PETITION FOR A REHEARING ON A PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Edgar V. Maher, files this petition for rehearing in the matter of the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The petition was denied on October 13, 1958, and this petition for a rehearing is filed within twenty-five days thereafter in accordance with Rule 58 of this Honorable Court.

In presenting this petition for rehearing, the petitioner brings to the attention of the Court matters and decisions not referred to in the original petition. In thus presenting this petition counsel for the petitioner begs the Court its indulgence in commenting on the decision of the United

States Court of Appeals below in presenting frankly why the opinion of the United States Court of Appeals is without precedent and reaches a height of absurdity and terminates with a holding that is frankly outrageous, and contrary to all of the statutes granting preference to veterans in governmental employment. The height of absurdity of statutory construction is reached when it is realized that the Court of Appeals below had ruled that an employee never sworn into the military service of the United States is entitled to veterans preference. Could there be a more silly conclusion or a more outrageous conclusion of law when all the hearings of Congress, all of the statutes, Executive Orders of the President of the United States, never since the year 1865 to the present time ever granted veterans preference except to honorably discharged soldiers, sailors or marines, or their dependents in certain instances, and never to any person who on his own account was not accepted for military service.

If the opinion of the Court below was not so serious as far as this petitioner was concerned, it could be laughed and scoffed at by all members of Congress who will be greatly surprised to find that they granted veterans preference to a man never accepted in the military service of the United States.

Counsel for the petitioner believes that any member of this Court who took five minutes to examine the briefs of the respective parties would, and must, conclude that the Court of Appeals below committed grievous error clearly contrary to the intention and purpose of the Congress of the United States in granting preference to veterans.

In presenting this petition for rehearing, counsel for the petitioner reiterates each and every matter and thing contained in the original petition filed herein.

Although the Army, Navy and Marine Corps granted numerous types of discharges from the service, Congress and the Executive Orders of the President of the United States have never granted preference to veterans except those who held honorable discharges from the service. This Court held in the case of Patterson v. Lamb, 329 U.S. 539, 91 L.Ed. 485, that a man discharged from the draft was not entitled to an honorable discharge, reversing the Court of Appeals below who had held that he was so entitled (154 F.2d 319).

In that case this Court, speaking through Mr. Justice Black, among other things said:

> "The only statute which directly bears upon "certificates of discharge" for enlisted men, Article of War 108, set out below, does not particularly prescribe the types or contents of certificates authorized to be granted. But pursuant to authority granted by Congress, the War Department many years ago promulgated Army Regulation No. 150 which provided for three types of certificates of discharge: honorable, dishonorable, and unclassified. An honorable discharge was one granted to a soldier whose conduct in service had been such as to warrant his re-enlistment. This regulation was well suited to fit cases of soldiers who had enlisted under ordinary conditions, had seen service and had been discharged in the course of regular Army routine. On its face, however, it shows how poorly it was adapted to fit the extraordinary circumstances bound to develop in connection with a nation-wide program for passing upon acceptances, rejections, and discharges of draftees in the course of their progress from their homes to their complete and final integration into the Army. So after the passage of the (May 18) 1917 Draft Act, 40 Stat. 76, c. 15, the War Department, on January 12, 1918, issued its Circular No. 651 in which it made provision for men discharged from draft as distinguished from men discharged from the Army. This provision, in effect, when respondent reported for induction, had particular, though not necessarily

exclusive, reference to draftees rejected for one reason or another at mobilization camps after their induction at their local draft boards. But despite the fact that draftees became subject to military law and duty from the moment of their arrival for entrainment at the local board, Selective Service Regulation 174-176 provided that they nevertheless were not finally accepted for military service, and could be rejected after arrival at camp. And it was not until they had been finally accepted that they could or would be assigned to full-fledged duty as soldiers." (329 U.S. 542)

Friedman, the employee who was held by the Court below to have veterans preference, was exactly in the same status as Lamb was in the case of Patterson v. Lamb, supra. The conflict of opinions between the decisions of this Court in the case of Patterson v. Lamb, supra, and the decision of the Court of Appeals below is apparent, and alone furnishes the proper grounds for the issuance of the writ of certiorari in this case.

Congress, in granting benefits to veterans such as compensation, burial allowances, G.I. Bill benefits, and many others, has always required that the veteran have an honorable discharge.

The bills introduced in 1944 to consolidate the various acts of Congress granting preference to veterans in governmental employment was captioned by the Committee in its hearings as follows: "Bills to give Honorably Discharged Veterans, their widows, and the wives of Disabled Veterans who themselves are not qualified preference in employment where federal funds are disbursed". (Hearings on S. 1762 and H. R. 4115, 78th Cong. Second Session May 19 and 23, 1944).

In the hearings before the Senate Committee, the following testimony was given by Commissioner Flemming

then a member of the United States Civil Service Commission:

"Mr. FLEMMING. Mr. Chairman, members of the committee:

The Civil Service Commission was requested by the Chairman to report on H.R. 4115, as passed by the House of Representatives. We have submitted a favorable report, suggesting one minor amendment, to which I will refer a little later.

I think possibly in understanding the provisions of H.R. 4115 it is helpful to realize that there have been preference laws on the statute books dated back to 1865. From 1865 to 1919, by law, the preference was limited to persons who were honorably discharged by reason of disability resulting from wounds or sickness incurred in the line of duty.

On March 3, 1919, the Congress in considering the preference problems arising out of the last war extended the preference to all honorably discharged veterans and their widows. Then, a few months afterward, namely, July 11, 1919, the Congress added to that they wives of injured veterans, whose husbands were not qualified to hold such positions.

Following the passage of the 1919 laws, there have been a series of executive orders, spelling out just what preference means, particularly in the classified service. I will refer to those executive orders as I discuss the various provisions of the bill.

I might say that the provisions of March 3, 1919, and July 11, 1919, laws were brought together and incorporated in a law passed in 1929.

I do not think it is necessary for me to discuss any further section 2. That has been discussed by Congressman Starnes and also Congressman LaFollette. Your attention has already been called to the changes made in existing law by the proposed section 2.

Senator BYRD. Mr. Flemming, at the bottom of section 2, it states "during any war, or in any campaign or expedition (for which a campaign badge has been authorized)." Is that existing law?

Mr. FLEMMING. No; there is one change there. Under existing law the so-called peacetime veteran receives prefefence. Under section 2 of H.R. 4115

he would not receive it in the future but section 18 which preserves any rights which have already been granted to peacetime veterans." (Senate Hearings, Pg. 16-17)

Not only was consideration given to other types of discharges other than honorable to veterans, but the Committee was urged to include in the bill those service men who held "blue discharges", and also "dishonorable discharges".

The following is extracted from the hearings:

Telegram dated April 6, 1944 (page 69 of hearings) from J. L. Bass urging amendments to bill to grant preference to bad conduct discharges.

Letter dated April 15, 1944, J. L. Deetz, recommending dishonorably discharged servicemen be given attention in preference bill:

"The committee probably knows there is in the armed forces a discharge called "blue discharge," which takes neither the rating of an honorable nor dishonorable discharge, but is intermediate. That sort of discharge is given in the case of a man who may be in the guard house too often or is a slacker or has bad habits or whose service is not considered for the good of the Nation but whose bad conduct does not reach such a point that the armed forces want to give him a dishonorable discharge. Consequently, he is given the discharge from the Army for the good of the service, that is not considered to be either honorable or dishonorable.

As I understand the bill—Mr. Flemming, you will correct me if I am wrong—a man who has had the blue type of discharge would not have any preference rights under this bill.

Mr. FLEMMING. If I am fully acquainted with the nature of the blue discharge, that is correct. In other words, the language "who has served honorably" has to be an affirmative showing he has served honorably in any branch of the armed forces before he is granted preference.

Senator BYRD. Do I understand, Mr. Chairman, the blue discharge is given to a slacker?

The CHAIRMAN. To a man who is not on his toes.

Senator BYRD. If that is the case, we do not want to give a slacker any preference.

The CHAIRMAN. I would agree with you.

Senator BYRD. I would like it clarified. If that is the case, that they give a blue discharge to a man who is a slacker, I certainly would not be willing to give him preference.

The CHAIRMAN. Very often a member of the armed forces who is lazy in his work, perhaps insubordinate, perhaps excessive drinking or otherwise displays undesirable qualities, he may be discharged out of the armed forces without either an honorable or dishonorable discharge, but merely returned to civilian life for the good of the service.

Senator BYRD. He should not be awarded then these preferences.

I might say that in certain cases the Army and Navy give that type of discharge to a man who is sort of a psychopathic case that cannot get along with his fellow men in the Army or with his officers.

Mr. RICE. Lest there should be any misconception concerning the matter, it is my understanding under the language on page 2, lines 6 and 7, "those ex-service men and women who have served honorably in any branch of the armed forces", would indicate as long as they did not have a dishonorable discharge they would be eligible for preference.

Under sub-section 4 of section 2 it states an honorable discharge is required but those who were discharged with disability do not necessarily have to have what is called an honorable discharge in order to be entitled to preference under section 2 of this bill.

If there is any other interpretation, it certainly ought to be cleared up.

The CHAIRMAN. Mr. Flemming, you have this entire situation in mind, have you, and you can discuss it with us at the executive session?

Mr. FLEMMING. Our understanding ties in with what Mr. Rice has just said. We agree with Mr.

Rice there has to be an affirmative showing of honorable service, that is right.

The CHAIRMAN. I was advised this morning by someone from the military service, from the Military Affairs Committee, that in the opinion of the Army anybody who had received a blue discharge would not be considered to have served honorably.

Mr. RICE. There is a distinction there. There are three different groups; those who have been discharged dishonorably; those discharged without honor, as in the case of some physical condition or mental condition; and those who have been discharged honorably. Those who have been discharged with some notation of a physical condition we consider to have had honorable service.

The CHAIRMAN. Well, I did not get that advice from the Army. They said they would not give the blue discharge to anybody they had considered had served honorably. They only used it where they thought the man was not serving honorably.

Mr. RICE. I do not like to rise again on this point. It is true probably that the Army has made some mistakes in giving blue discharges to persons who were discharged actually because of a physical condition. The Army as well as the Navy has given assurance that where there has been a mistake in those special cases they will be glad to correct the mistake and issue a new certificate.

The CHAIRMAN. Of honorable discharge?

Mr. RICE. Yes; showing an honorable discharge." (Pp. 69, 70, 71 Hearings)

It is clear from the hearings that section 18, which was incorporated in the Act (page 4-5 original petition, 5 U.S.C. 867), was incorporated only for the purpose of protecting the rights of so-called peacetime veterans with honorable discharges.

"Mr. JOHNSON. There is no discrimination of any kind now existing against the Regulars.

The CHAIRMAN. You mean they are still judged by the same standard as the wartime veteran even though we pass this bill?

Mr. FLEMMING. No; that is not so.

The CHAIRMAN. That is what my question is directed to.

Mr. FLEMMING. No, Mr. Chairman; under this bill the regular veteran that Mr. Johnson is talking about would not be extended preference, that is, the person who files in the future for a civil-service examination would not be given the 5 points and 10 points and put at the top of the list.

The CHAIRMAN. Well, then, this bill in effect does repeal the existing Executive orders in that respect?

Mr. FLEMMING. That is right. The thing it does not do is this: Let me take the case of Mr. A, who in the past came into the Federal service. He is a regular veteran and he has been extended preference and is still serving. Now, if it became necessary in the agency in which he is serving to put into effect a reduction-in-force program, he would be regarded as a veteran in the development or the building up of the reduction-in-force list. Section 18 has the effect of not taking away from him that which he has already been granted.

The CHAIRMAN. It has become a vested right, in other words.

Mr. FLEMMING. "Section 18 would protect that." (Pp. 59-60 of Hearings)

A decision that a man discharged from the draft and never accepted for military service is accorded veterans preference is so foreign to the purposes of granting preference to veterans in governmental employment that it reaches an absurdity. No Judge who gave any study to the purposes of the legislation could reach such a silly conclusion.

This Court held in the case of Church of Holy Trinity v. United States, 143 U.S. 457, 36 L.Ed. 226 that if a literal construction of a statute be absurd the Court must restrain the words. All laws should receive a sensible

construction. In construing an Act, the function of the Courts is to effect the intent of Congress.

Section 18, the saving clause, should be construed in accordance with the intent of Congress. All of the statutes, and executive orders clearly show that it never was the intent of Congress to grant preference to employees never actually sworn into the service of the United States.

The construction placed on Section 18, the saving clause, by the Court below is so utterly absurd that it is the duty of this Court to grant the application for a writ of certiorari. Otherwise, you have judicial legislation based on a void order of the Civil Service Commission granting an employee preference in employment when in fact none ever existed.

The Court of Appeals below has been reversed in the case of Mitchell v. Cohen, 333 U.S. 411, a case involving veterans preference. It was also reversed in Patterson v. Lamb, supra, in a case which directly involved veterans preference as to the right to receive an honorable discharge. The Court now apparently has reversed its former opinion in the case of McDougall v. Civil Service Commission, 92 U.S. App. D.C. 69, and in so doing its opinion conflicts with the decision of this Court in the case of Patterson v. Lamb, supra. This Court denied certiorari in the McDougall case, 345 U.S. 969. The opinions of the Court of Appeals below show that the members either do not understand the purposes of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 851) or else they have tried to expand the same by judicial legislation.

CONCLUSION

WHEREFORE, The petitioner prays that the order of this Court entered on October 13, 1958 denying the application for a writ of certiorari be set aside, and that

this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, and upon a review, that the judgment of the said Court of Appeals be in all things reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Claude L. Dawson, attorney for the petitioner, do hereby certify that this petition for a rehearing in this cause is made in good faith and not for the purposes of delay.

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